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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1962

No. 475

TOM SAMUELS, Trustee of FUTURE MANUFACTURING COOPERATIVE, INC., a Corporation,

Petitioner,

vs.

KOCKOS BROTHERS, LTD.,

Respondent.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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Tom Samuels, Trustee of Future Manufacturing Cooperative, Inc., a corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on July 6, 1962.

CITATIONS TO OPINIONS BELOW

The order of the referee in bankruptcy (determining attachment lien to be null and void and restraining further proceedings) is printed in the record of the United States Court of Appeals, copies of which are filed herewith, at 27-31. Said referee's "Certificate on Petition for Order of Review" appears at R. 3-10. Said opinions are unreported.

The opinion of the District Court is unreported and appears at R. 49-53. The District Court's "Order Upon Rehearing" is unreported and appears at R. 61-63.

The opinion of the United States Court of Appeals, and the dissenting opinion of Judge Beeks, are printed in Appendix A hereto, *infra*, page 13, and are unreported.

JURISDICTION

The judgment of the United States Court of Appeals was entered on July 6, 1962, Appendix A infra. The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTION PRESENTED

Whether the creditor of a bankrupt, who had filed a general unsecured claim but made no move against a debtor of the bankrupt against whom said creditor had an attachment lien during the two and one-half years that the bankruptcy was pending, and received

a first and final dividend of 20.94% from the bankrupt estate; and who then attempts to execute against said debtor of the bankrupt, said debtor having already paid over the entire debt to the trustee in bankruptcy, may assert that the period of limitations in the bankruptcy act bars the trustee in the reopened bankruptcy proceeding from restraining said creditor's efforts to make that debtor of the bankrupt pay twice; and whether such period of limitations prevents the trustee of the reopened bankrupt estate from taking action to restrain that creditor.

STATUTE INVOLVED

The statute involved is Section 11e of the Bankrupty Act, 11 USC Section 29(e), reading as follows:

> "A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy. . . ."

STATEMENT OF THE CASE

The basis for Federal jurisdiction of the case is 28 USC 1334, providing that the United States District Court has original jurisdiction in all matters and proceedings in bankruptcy, exclusive of the courts of the states.

Future Manufacturing Cooperative, Inc., was generally engaged in the grocery business in San Jose. On January 3, 1956, a fire occurred at its premises, substantially destroying them and the stock in trade. At the time of the fire, Future had a policy of fire insurance issued by Canadian Fire Insurance Company in the sum of $15,000. The loss exceeded the amount of the policy.

On January 11, 1956, appellee Kockos Bros. filed an action against Future in the State Court for $13,501, R. 41-43. Upon filing of said action, Kockos Bros. secured a writ of attachment which it caused to be served upon Canadian Fire Insurance Company.

Future filed its voluntary petition in bankruptcy in the United States District Court on January 30, 1956, and was duly adjudged a bankrupt on January 31. The Honorable Bernard J. Abrott, Referee in Bankruptcy, issued his "Order Appointing Receiver" on February 6, 1956, R. 59-61. According to said order, Ralph E. Williams, of San Jose, was appointed Receiver. As part of said order, all persons, firms, corporations and their agents were ordered to deliver forthwith to the Receiver all and every the assets of the bankrupt, R. 60; and all creditors were enjoined and stayed from in any way interfering with any assets of the bankrupt, or instituting or prosecuting any actions against the bankrupt, without the further order of the Bankruptcy Court, R. 60-61. (So far as may be ascertained, notice of said order appointing Receiver and restraining order was not generally given by Williams. In any event, the re-

cital contemplated by General Order No. 23 in Bankruptcy, 11 USC following Section 53, is lacking.)

Canadian Fire Insurance Company made no return to the writ of attachment but it did turn over the full proceeds of its policy to Williams, receiving in return therefor a receipt, R. 31-32, reciting, "I will also ask and request from the Court that all assignments and attachments now on these funds at Canadian Fire Insurance Company will be released.". The proceeds of the fire insurance company made up substantially all of the assets of the estate, which totaled less than $16,000.

The bankrupt estate was administered in due course by Williams. The schedules included the alleged claim of Kockos Bros. and notice to creditors went out to them. Kockos Bros. timely filed a claim in the bankruptcy proceeding, R. 66-68, in which it claims as security for its debt written guaranties of certain individuals, R. 67, but not the proceeds of the fire insurance policy. The claim of Kockos Bros. indicates that judgment had been rendered in the State Court ". . . with attachment on Canadian Fire Insurance Company, January 12, 1956, (no answer by garnishee)". Canadian, as hereinabove indicated, paid over the entire proceeds of its policy to the receiver prior to the filing of Kockos Bros.' claim.

Kockos Bros. took a default judgment against Future, the bankrupt, in April 1956 in the aforementioned State Court action. It took no further step in said State action for two and one-half years thereafter.

Meanwhile, the Referee in Bankruptcy approved a first and final dividend of 20.94% on September 24, 1958, R. 32-37, under which Kockos Bros. received some $2,846, R. 36.

On October 30, 1958, Kockos had a writ of execution issued by the State Court based on the aforementioned default judgment against Future. That writ of execution was served on Canadian Fire Insurance Company which reported to the Sheriff that it held no funds belonging to Future. Kockos then filed suit against Canadian Fire Insurance Company in a second State Court action for the proceeds of Canadian's fire insurance policy, R. 37-41. Said State Court action was filed December 26, 1958, and was served after the first of the year 1959. Meanwhile, Williams was discharged as Trustee and the bankrupt estate was closed on December 31, 1958. Williams had not taken steps to release the attachment allegedly made on the proceeds of Canadian's fire insurance policy by virtue of the 1956 writ of attachment.

In March 1959, the bankrupt estate was reopened on the petition of certain creditors, R. 11-13; and the estate was re-referred to the Honorable Bernard J. Abrott, R. 13-14. This appellant was appointed Trustee. Appellant thereupon petitioned the Bankruptcy Court for its order restraining Kockos Bros. from prosecuting further its State Court action against Canadian, R. 15-18. Referee Abrott granted that petition, R. 27-31. That order includes comprehensive findings of fact.

Kockos then petitioned for review of Referee Abrott's order under Section 39 of the Bankruptcy Act,

R. 44-48. Referee Abrott's certificate on petition for review appears at R. 3-9, including his comprehensive statement of proceedings and his discussion.

The District Court, in its "Order and Judgment upon Petition for Review," R. 49-53, vacated and set aside Referee Abrott's order of September 4, 1959, upon the *sole ground* that the two year period of limitations for acts taken by a trustee had expired (11 USC 29(e)). Appellant's motion for a rehearing was denied, R. 61-63.

The Court below affirmed the order of the District Court on the ground that the trustee's action was barred by the two year statute of limitations; although the majority nevertheless expresses itself as disapproving the actions of the Appellee and as sympathetic with the position in which the debtor finds itself. The majority notes that the debtor Canadian can set up such defenses as it may have in the action now pending in the California State Court. The dissenting judge of the Court below felt that the action taken by the trustee was not barred by limitations and that the conduct of appellee (respondent herein) was such that it should be held estopped to assert the statute of limitations. The dissenting judge also expressed his feelings as follows:

> "In a very real sense, however, the real party in interest is the Federal Judicial System, confidence and respect in the ability of the Federal courts to mete out justice. I view this action as one seeking such an objective. . . . It would appear that the majority, although recognizing that an injustice has been done, prefer to leave the

correction to some other tribunal, the effect of which would be to sweep our own dirt under the rug in the hope that some one else will clean it up. In order to preserve the estates of bankrupts and to save needless expense to others in bankruptcy matters, voluntary action in the handing over of assets, such as was undertaken by Canadian Fire Insurance Company in this case, should be encouraged, not discouraged."

REASONS FOR GRANTING THE WRIT

This case involves significant interrelated aspects of the bankruptcy law which ought to be settled by this Court: When is a general creditor, who participates with all others in the distribution of a bankrupt estate, estopped to assert the two year period of limitations against a trustee who seeks to enjoin the efforts of that creditor to make a bankrupt's debtor pay twice? When does the two year period begin to run against a trustee who is lulled into inaction by the conduct of such creditor? What are the powers of the trustee and the referee, as officers of the Court, to rectify an obvious injustice?

This Court has emphatically endorsed the principle of equitable estoppel to assert the statute of limitations;

Glus v. Brooklyn Eastern District Terminal (1959), 359 U.S. 231, 3 L. Ed. 2d 770, 79 S. Ct. 760;

Schroeder v. Young (1896), 161 U.S. 334, 40 L. Ed. 721, 16 S. Ct. 512.

In *Davney v. Levy* (2 Cir. 1950), 191 Fed. 2d 201, Judge Learned Hand held at page 204 that the interpretation which the Supreme Court has put upon the precursor of Section 29(c) of the Bankruptcy Act means much more than that the statute adds two years from the date of "adjudication". He held that in cases of fraud, which includes deception, the trustee always has two years from when he learns of the fraud. Certiorari in that case was denied, 342 U.S. 887, 96 L. Ed. 665, 72 S. Ct. 177, rehearing denied, 342 U.S. 911, 96 L. Ed. 682, 72 S. Ct. 301.

With reference to the running of the period of limitations being suspended by fraud or deception, this Court has said,

> "This equitable doctrine is read into every Federal statute of limitation," *Holmberg v. Armbrecht,* 327 U.S. 392, 90 L. Ed. 743, 66 S. Ct. 582.

There is abundant authority for the proposition that the filing of a general claim in the bankruptcy proceeding results in the waiver of a secured creditor's right to his security:

> *In re O'Gara Coal Co.* (7th Cir., 1926), 12 Fed. 2d 426 (Certiorari denied, *Chicago Title & Trust Co. v. Gardner,* 271 U.S. 683, 46 S. Ct. 633, 70 L. Ed. 1150).

In *United States National Bank v. Chase National Bank* (1947), 331 U.S. 28 67 S. Ct. 1041, 91 L. Ed. 1320, the Court said at 67 S. Ct. 1045:

> "It is generally true that participation by a secured creditor in distributions from the general

assets on the basis of his full claim indicates a waiver of the security and an election to be treated as an unsecured creditor. . . . In determining whether a waiver of lien has taken place, the Bankruptcy Court must accordingly look to the equities involved, as well as to the intention of the parties. . . . It is at once evident in this case that the judgment lien creditors received dividends from the general fund in good faith and without any intent to waive their lien. . . ."

In the case at bar the predecessor of this trustee may well have thought, from the conduct of respondent Kockos Bros., that its intent was to waive any attachment or other lien that it might otherwise have asserted.

Indeed, the referee found, in his "Discussion" at R. 7-9, as follows:

"The delay of Kockos Bros., Ltd., in taking any proceedings against the Canadian Fire Insurance Company until after they received the first and final dividend from the Trustee and then instituting the pending proceedings and objecting to the propriety of the reopening of this estate and the pending proceedings of the successor Trustee to annul the attachment which was clearly voidable under Section 67 of the Bankruptcy Act in the original proceedings, clearly contributed to and may even have been deliberately calculated to lull the Trustee and the other creditors into the position in which Kockos Bros., Ltd., could and might benefit in excess of the proper pro rata of the $15,000.00 fire insurance fund which they have already received."

The referee's findings of fact are entitled to great weight and must be accepted by the District Court unless they are clearly erroneous, General Order No. 47 in Bankruptcy (11 USC following Section 53).

Our complex commercial era is characterized by increasing use of the Bankruptcy Courts. Reasonable interpretation of the law governing those Courts should permit them to do simple justice when the facts clearly require their acting, and should not result in their action being stultified.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
September 26, 1962.

Respectfully submitted,

ALLEN M. SINGER,
Attorney for Petitioner.

EDWARD A. FRIEND,
Of Counsel.

(Appendix A Follows.)

Appendix A

United States Court of Appeals
For the Ninth Circuit

Tom Samuels, Trustee of Future Manufacturing Cooperative, Inc., a corporation, Appellant, vs. Kockos Bros., Ltd., Appellee.	No. 17,101 July 6, 1962

Appeal from the United States District Court for the Northern District of California, Southern Division.

Before: HAMLIN and DUNIWAY, Circuit Judges, and BEEKS, District Judge.

HAMLIN, Circuit Judge.

In bankruptcy proceedings pertaining to the insolvent estate of Future Manufacturing Cooperative, Inc., bankrupt, a referee in bankruptcy declared an attachment lien of a creditor of the bankrupt to be null and void. Upon a petition to review the referee's order the United States District Court for the Northern District of California, Southern Division, vacated and set aside the referee's order on the ground that

the two-year period of limitations for actions taken by trustees in bankruptcy had expired. Tom Samuels, trustee in bankruptcy of said bankrupt and appellant herein, timely filed an appeal to this court which has jurisdiction under section 24 of the Bankruptcy Act, 11 U.S.C.A. § 47, and 28 U.S.C.A. § 1291.

The following facts are shown by the record.

Prior to January, 1956, Future Manufacturing Cooperative, Inc., herein called the bankrupt, was engaged in the grocery business in San Jose, California. On January 3, 1956, a fire occurred on the bankrupt's premises completely destroying its stock in trade. At that time the bankrupt had a policy of insurance with the Canadian Fire Insurance Company in the sum of $15,000. The loss from the fire exceeded the amount of the policy.

On January 11, 1956, Kockos Bros., appellee herein, filed an action in the Superior Court of the State of California in and for the City and County of San Francisco (No. 454879) against the bankrupt for $13,501 in which action Kockos Bros. secured a writ of attachment and served it with a notice of garnishment upon Canadian.

On January 30, 1956, a voluntary petition in bankruptcy was filed by the bankrupt. The referee in bankruptcy appointed Ralph E. Williams receiver of the estate, and as a part of said order all persons, firms, corporations and their agents were ordered to deliver forthwith to the receiver the assets of the bankrupt. Further, in said order all creditors were

enjoined and stayed from in any way interfering with any assets of the bankrupt or instituting or prosecuting any actions against the bankrupt without the further order of the bankruptcy court. The record does not disclose that notice of the order appointing the receiver or of the restraining order was generally given by Williams.

Canadian, the garnishee in Kockos' state court action against the bankrupt, made no return on the writ of attachment and notice of garnishment served upon it. However, on February 2, 1956, it turned over to Williams as receiver the full proceeds of the $15,000 policy which it had issued to the bankrupt. Williams gave Canadian a receipt which recited, among other things, the following:

> I will execute Proof of Loss to the Canadian Fire Insurance Company as soon as the exact amount has been determined after a check of the extensions on the inventory.
>
> I will also ask and request from the Court that all assignments and attachments now on these funds at Canadian Fire Insurance Company will be released.

On September 24, 1958, the trustee paid to the creditors of the bankrupt a first and final dividend in the sum of 20.94% of all unsecured claims allowed, the amount received by Kockos Bros. on its claim being $2,846.12.

On October 31, 1958, appellee, Kockos Bros., after having obtained a default judgment against the bank-

rupt on April 27, 1956, caused a writ of execution to be issued by the state court and levied on Canadian. Canadian filed a response thereto stating, "We have no assets of the Future Manufacturing Cooperative, Inc." On December 26, 1958, the appellee commenced an action (No. 485280) against Canadian in the same state court and in said action which is still pending appellee is attempting to recover from Canadian the amount of its judgment by reason of the attachment lien obtained in the previous action, the writ of execution issued subsequent to the judgment obtained therein, and the refusal of Canadian to pay pursuant to the levy.

The bankrupt's insolvent estate was closed and the receiver was discharged on December 31, 1958.

On March 19, 1959, three of the creditors of the bankrupt procured an order from the district court reopening the bankrupt estate and referring the matter to the referee. Tom Samuels, appellant herein, was regularly elected trustee. On May 5, 1959, he filed with the referee in bankruptcy a petition for an order adjudging the attachment and execution liens of appellee to be null and void insofar as they affect the $15,000 proceeds of the fire insurance policy of Canadian and for an order restraining appellee from further prosecuting its action (No. 485280) against Canadian. The referee issued an order to show cause upon said petition, and after hearing thereon the referee made findings of fact and conclusions of law. He declared that the above mentioned attachment and execution liens were null and void under the pro-

visions of section 67a of the Bankruptcy Act, 11 U.S.C.A. § 107, and he permanently restrained and enjoined appellee from taking any further proceedings in its then pending action (No. 485280) against Canadian.

A petition for review of the referee's order was filed in the district court and after hearing the district judge reversed, vacated and set aside the order of the referee. This appeal followed.

Section 67a(1) of the Bankruptcy Act, 11 U.S.C.A. § 107a(1), provides that "[e]very lien against the property of a person obtained by attachment . . . within four months before the filing of a petition . . . under this act . . . shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent. . . ." And under subdivision (4) of section 67a, 11 U.S.C.A. § 104a(4), "[t]he court shall have summary jurisdiction of any proceeding by the trustee . . . to hear and determine the rights of any parties under this subdivision. . . ."

Section 11e of the Bankruptcy Act, 11 U.S.C.A. § 29e, provides a time limit of two years "subsequent to the date of adjudication" within which the trustee may "institute proceedings in behalf of the estate upon any claim against which the period of limitation had not expired at the time of the filing of the petition in bankruptcy." Applying this section the Supreme Court, in *Herget v. Central Bank Co.*, 324 U.S. 4 (1945), has held that a trustee was bound to "institute proceedings in behalf of the estate" to

set aside and recover any preferential transfer (section 60 of the Bankruptcy Act) "within two years subsequent to the date of adjudication." Section 11e would apply similarly to an action under section 67a of the Bankruptcy Act. See generally 1 Collier, Bankruptcy ¶ 11.13 (14th ed., Supp. 1961).

In this case the date of the adjudication was January 30, 1956, and the proceeding to set aside the attachment lien which had been obtained within four months prior to the filing of the petition in bankruptcy was not brought by the trustee until May 5, 1959, over three years subsequent to adjudication. We agree with the district court that the trustee's action was not timely and was barred by the two-year statute of limitations as provided for in section 11e of the Bankruptcy Act, 11 U.S.C.A. § 29e.

Appellant urged before the district court that appellee is estopped from asserting the bar of the statute of limitations, but the district court refused to so hold. The court stated:

> The real party in interest in the petition to declare the lien null and void is the Canadian Fire Insurance Co., or possibly the trustee in his personal capacity. It does not appear that either the estate or the creditors of the estate, other than Kockos Bros., have an interest in the outcome of the petition. In these circumstances it seems to this Court that the statute of limitations should be construed so as to avoid the misuse of the bankruptcy courts.

We agree.

Our affirmance of the district court does not mean, however, that this court approves of the actions of appellee, that we are not sympathetic with the position in which Canadian finds itself, or that necessarily Canadian will be forced to pay twice because of the failure of the receiver in the bankruptcy proceedings to keep his promise and to bring his action to set aside the attachment lien in the original proceedings prior to the running of the statute of limitations. In the action (No. 485280) now pending in the California Superior Court against Canadian, Canadian can set up such defenses as it may have.[1]

The judgment of the district court is affirmed.

BEEKS, District Judge (Dissenting)

I am in accord with my brothers in their refusal to approve the actions of appellee herein but further I cannot go.

The majority agrees with the court below that the cause of action involved herein is time barred and that appellant misused the bankruptcy court. I am satisfied that the latter conclusion influenced the former and I am unable to agree with either.

---

[1]In the state court action a summary judgment for Canadian was reversed on the ground that several defenses of Canadian (e.g. waiver of security by participation in distribution of the bankrupt's estate and estoppel) presented triable issues of fact. Kockos Bros. v. Canadian Fire Ins. Co., 195 A.C.A. 527, 16 Cal. Rptr. 93 (1961) [195 C.A.2d 468].

A reading of the entire record convinces me that the conduct of appellee was such that it should be held estopped to assert the statute of limitations.

Canadian Fire Insurance Company voluntarily turned over to the receiver the sum of $15,000.00 upon the condition that the receiver would ask and request from the court that all assignments and attachments on said money be released. This condition was never complied with. In fact, compliance was never even attempted. The receiver is an officer of the court (11 U.S.C.A. 1, (22); *United States, et al., to Use of Merchants & Manufacturers Securities Co. v. Johnson, et al.* (C.A. 8—1938), 98 F. 2d 462) and the injustice giving rise to the instant action thus resulted from the nonfeasance of an officer of the court.

The trial court and the majority of the court herein view this action as being instituted on behalf of Canadian Fire Insurance Company as the real party in interest. In a technical sense this is probably true as Canadian Fire Insurance Company would undoubtedly benefit if the action below had been successful. In a very real sense, however, the real party in interest is the Federal judicial system; confidence and respect in the ability of the Federal courts to mete out justice. I view this action as one seeking such an objective. The trustee, who likewise is an officer of the court (11 U.S.C.A. 1, (22); *Pearson v. Higgins* (C.A. 9—1927), 34 F. 2d 27, cert. denied 280 U.S. 593, 74 L.Ed. 641), is seeking to correct an injustice resulting from the nonfeasance of another officer of the court, the receiver. It would appear that the

majority, although recognizing that an injustice has been done, prefer to leave the correction to some other tribunal, the effect of which would be to sweep our own dirt under the rug in the hope that someone else will clean it up. In order to preserve the estates of bankrupts and to save needless expense to others in bankruptcy matters, voluntary action in the handing over of assets, such as was undertaken by Canadian Fire Insurance Company in this case, should be encouraged, not discouraged.

I think the referee reached the correct conclusion and I would reverse.

(Endorsed) Opinion and Dissenting Opinion Filed July 6, 1962.

Frank H. Schmid, Clerk.

United States Court of Appeals
for the Ninth Circuit

Tom Samuels, Trustee of Future Manufacturing Cooperative, Inc., Appellant, vs. Kockos Bros., Ltd., Appellee.	No. 17,101

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed, with costs in favor of the appellee and against the appellant.

Filed and entered July 6, 1962.